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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-637

JERE L. DENTON, *Petitioner,*

vs.

ROBERT C. SEAMANS, Secretary of the Air Force, Pentagon, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that this court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 8, 1973.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A. The opinion of the United States District Court for the Northern District of California is reported at 315 F.Supp. 279 (1970) and is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 8, 1973, and an Order by that court denying a rehearing was filed on July 16, 1973.

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether Petitioner was deprived of his rights to due process and to confront adverse witnesses under the Fifth and Sixth Amendments of the United States Constitution by Respondent's failure to produce an essential adverse witness and denial, without reason, of Petitioner's alternative request to take that witness' deposition prior to the Air Force Board of Inquiry proceeding.

II. Whether Petitioner was deprived of a fair and impartial hearing before a Board of Inquiry, under applicable federal statutes and Air Force regulations, by Respondent's failure to produce an essential adverse witness and denial without reason of Petitioner's prior request to depose that witness.

III. Whether the decision of the U.S. District Court granting Summary Judgment can be procedurally sustained by the Opinion of the Court of Appeals which either expressly or by implication disavows and/or refutes the grounds for the decision expressed by the District Court, and instead affirms on what it believes the Air Force Board of Inquiry would have done if petitioner had been granted all of

procedural and substantive rights which they admit were denied him.

CONSTITUTIONAL AND STATUTORY PROVISIONS PROVIDED

1. The Fifth and Sixth Amendments of the United States Constitution are involved in this case.

2. The following portions of Chapter 860, Title 10, of the United States Code are also involved:[1]

> "§8791. Selection boards: composition; duties.
>
> "The Secretary of the Air Force may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Air Force to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security to show cause for his retention on the active list.
>
> "§8792. Boards of inquiry: composition, duties.
>
> * * * * *
>
> "(b) A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention."

3. The following provisions of the 1963 Air Force Regulations 36-2 governing the elimination or release of officers from active duty by reason of unfitness,

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[1]The statutory right to a "fair and impartial" hearing is provided only for regular Air Force officers; Captain Denton as a reserve officer is governed by 10 U.S.C. §§1162-63 which have no such provision. However, AFR 36-2 applies to both regular and reserve officers and is applicable to Captain Denton. It was promulgated pursuant to 10 U.S.C. §§8791, *et seq.*, and reiterates the guarantee of a "fair and impartial" hearing.

unacceptable conduct or inefficiency, are also involved:

"24. Rights of Respondent. An officer whose case is referred to a Board of Inquiry for consideration under this regulation has the following rights:

* * * * *

"c. *Witnesses.* He may request the appearance before the Board of Inquiry of any witness whose testimony he believes to be pertinent to his case. He will specify in his request the type of information the witness can provide. The Board of Inquiry will invite the witness to attend if it considers that the witness is reasonably available and that his testimony can add materially to the case. However, the respondent will not be reimbursed for expenses in connection with the appearance or assistance of civilian witnesses or military personnel not serving in the active military service.

"d. *Evidence.* He may submit depositions, sworn or unsworn statements, certificates, affidavits, or other stipulations for consideration by the Board of Inquiry, whether or not he appears in person before the Board. He may submit a written brief covering any phase of his case at any time before the Board of Inquiry convenes, during its proceedings, or after conclusion of the hearings as specified in paragraph 29d(3)(a)2.

* * * * *

"f. *Question Witnesses.* He personally or through his counsel may question any witness brought before the Board of Inquiry.

"26. Conduct and Action of the Board of Inquiry. The major air commander will furnish each Board of Inquiry a copy of AFM 36-7, "Guidance Manual for Boards of Inquiry," which contains specific insructions for the conduct and action of the board. He also will furnish a copy of AFM 36-7 to the respondent. When a Board of Inquiry is conducted, strict rules of evidence will not be followed. However, reasonable bounds of relevancy, competency, and materiality should be maintained. When the board meets in closed session, *only the voting members will be present.* Advice of the legal adviser may be sought when necessary, but in that case the Board will be opened and advice will be obtained in open session in the presence of the recorder, respondent, and counsel. However, after the Board has made a final decision in the case, it may request the presence of the legal adviser in closed session to assist in drafting the findings, determination, and recommendations of the Board. In either case, such proceedings will be made a part of the record.

* * * * *

"c. *Delay in Convening the Board of Inquiry.* The respondent, within 5 calendar days after receipt of notice of place and date of hearing, may request that convening of the Board of Inquiry be delayed for a specific period of time, normally not more than 15 calendar days. A delay of more than 15 calendar days will not be granted unless denial would prejudice the rights of the respondent. Requests will be submitted in writing direct to the President of the Board of Inquiry, and must clearly establish that the delay is essential

for the respondent to prepare his case for presentation to the Board. The President of the Board may approve the request, and delay convening of the Board of Inquiry not more than 15 calendar days from the date it was originally scheduled to convene. He will forward any request for delay of more than 15 calendar days to the major air commander. The major air commander may approve requests for delay of not more than 30 calendar days. If he disapproves a request or if the request is for a delay of more than 30 calendar days, the major air commander will forward the request to HQ, USAF (AFP-MPKA), Wash 25, DC for final decision. Commanders will include in their forwarding indorsements a recommendation for approval or disapproval of the request for delay, giving reasons for such recommendation.

"d. *Witnesses.* The Board should invite witnesses to appear if the witnesses are reasonably available and if, in the Board's opinion, their testimony is essential or will contribute materially to the case. Article 49, UCMJ (10 U.S.C. 849), will be used as a general guide in determining availability of witnesses. The use of affidavits or depositions to obtain testimony of witnesses who are not reasonably available is encouraged. Witnesses will be contacted as follows:

* * * * *

"(2) *Members of the Air Force Serving in the Active Military Service.* The President of the Board of Inquiry will request the major air commander concerned to make

the member available as a witness. The major air commander may deny the request if he determines that military requirements do not permit the member to appear before the Board as a witness. Direct communication between major air commands is authorized when required. Travel of military witnesses will be limited to official military transportation when practicable. If official military transportation is not available, commercial means may be used. Funds for reimbursement of travel will be provided from resources available to the major air commander conducting the Board."

STATEMENT OF THE CASE

Petitioner was a captain and senior pilot in the Air Force Reserves, stationed in Germany from 1961 to 1965. He had been on active duty since 1953.

On February 13, 1964, the Air Force initiated proceedings for his discharge according to Air Force Regulations 36-2, governing discharges for unacceptable conduct. There were five charges:[2]

Statement of Reasons

1. Captain Jere L. Denton, AO2227733, has conducted himself in a manner incompatible with exemplary standards of personal conduct, char-

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[2]Captain Denton has repeatedly asserted that these charges were initially prepared and submitted through channels by his immediate commanding officer, Lt. Col. James M. Wyse, and that accordingly Lt. Col. Wyse was in fact both the only accusatory witness, and the principal evidentiary witness, although he was never present at any stage of the proceedings of the Board of Inquiry.

acter and integrity, as is evidenced by his recurrent misconduct in that:

a. During the period of about 1 October 1963 to about 31 December 1963, he maintained a close continuing association with one Herbert Schumacher, an individual known to him to have been convicted of the crime of conspiracy to commit treason against the Federal Republic of Germany; during which period of association with Schumacher he visited the convicted traitor in his home and in prison on several occasions and wrote him numerous letters; such association casting a highly unfavorable reflection upon the United States Air Force, as well as constituting a violation of lawful regulation.

b. During the period 1 October 1962 to about 28 February 1963, at Heiligenrode, Germany, he wrongfully and unlawfully cohabited and engaged in adulterous intercourse with Ann Mattson, a woman not his wife, he being at that time married to another woman; such wrongful cohabitation being open and notorious, Captain Denton maintaining a residence with Ann Mattson and holding her out as his lawful wife, introducing her to acquaintances as "Ann Denton"; for which offense of wrongful cohabitation he received a reprimand and a suspended forfeiture of $300 per month for two months, under provisions of Article 15, UCMJ on 10 December 1963.

c. On or about 2 December 1963, he exhibited a defective attitude and behaved himself with disrespect toward his commander, Lt Col James M. Wyse, AO420997, while being coun-

seled by his commander concerning his behavior and lack of judgment in associating with one Herbert Schumacher, a German National of unsavory reputation who had been convicted of conspiracy to commit treason against the Federal Republic of Germany, by saying to the said Lt Col Wyse, "Well, if the service is going to tell me who I can or cannot associate with, I want no part of the service", or words to that effect.

d. On or about 20 October 1962, he did have in his possession in his BOQ room at Rothwesten, Germany a number of obscene photographs of women in lewd and provocative poses and in various stages of undress, including some pictures of the females completely nude.

2. Captain Jere L. Denton, AO2227733, has mismanaged his personal affairs in that he failed to provide, without good cause, timely and adequate financial support to his dependent wife and three children.

On July 1, 1964, a Board of Inquiry hearing requiring Petitioner to show cause for retention was scheduled to convene on July 16, 1964 at Sembach Air Base, Germany. Petitioner received notice of this hearing on July 9, 1964.[3] The notice required him, within five days, to acknowledge receipt and provide

[3]The significant exchange of correspondence relating to the institution of charges by the Air Force and Captain Denton's timely request for the right to confront and cross-examine the one adverse witness appears at length in Appendix A (Pertinent Official Letters of Action under AFR 36-2) to Appellant's Brief in the Court of Appeals.

"names and addresses of any witnesses you desire to appear before the Board of Inquiry." The notice also stated that the "Board will arrange for the presence of any witness who is reasonably available and whose testimony the Board believes will materially add to your case." Further, it advised Petitioner of his right to request a postponement of the hearing in order to enable him to prepare his case. The following day, July 10, Petitioner acknowledged receipt of the notice, requested the presence of Lt. Col. Wyse and requested a fifteen-day postponement of the hearing.

Petitioner was advised on July 23, 1964 that Lt. Col. Wyse had been transferred back to the United States and thus was unavailable. On that date petitioner requested the Board for a postponement until Lt. Col. Wyse became available, or, in the alternative, until Petitioner could take the deposition of Lt. Col. Wyse in the United States. By letter of July 29, 1964, Petitioner was advised that the hearing would be held on August 12, 1964 and that "your application for further delay in convening this Board of Inquiry appears to be without adequate justification and has been denied by the President of the Board."[4]

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[4]Significantly, the Court of Appeals in its opinion made no attempt to directly treat or comment upon the reasons expressed by the District Court for granting Summary Judgment. See Appendix A. In brief, the trial court ruled, "That the Board did not consider the testimony of Colonel Wyse to be essential" and that "plaintiff failed to make any effort whatsoever on his own behalf" to obtain Col. Wyse. The Brief on appeal was directed at great length to these issues and their refutation. The Court of Appeals admits that, "Denton had no chance to cross-examine Wyse," and that this standing alone would warrant reversal, but makes no comment on the rationale of the trial court which

Petitioner received no further response regarding his requests for Lt. Col. Wyse's presence or deposition, and the Board of Inquiry convened on August 12 and 13, 1964, at Sembach Air Base, Germany. The Board recommended that Petitioner be given a general discharge without readjustment pay and found against Petitioner on all five charges. Petitioner then appealed to the Air Force Board for the Correction of Military Records, according to 10 U.S.C. §1552, and his appeal was denied.

Petitioner then brought suit in the United States District Court for a declaration that his discharge was illegal, and for back pay. Summary judgment was rendered in favor of the Air Force, on the basis that Petitioner had not himself arranged for the presence of Lt. Col. Wyse. Petitioner appealed to the United States Court of Appeals, which affirmed the summary judgment on June 8, 1973. Petitioner sought and was denied a rehearing on July 16, 1973.

In its decision, the Court of Appeals reasoned that finding 1c alone, regarding disrespect toward Lt. Col. Wyse, might merit reversal because of Petitioner's inability to confront Lt. Col. Wyse, but that the other findings supported judgment against Petitioner. The decision discounted as "makeweight" both findings 1c regarding disrespect and 1d, regarding possession of purportedly obscene photographs. But it declared that finding 1a, regarding Petitioner's association with

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appears to assert both a procedural failure by Captain Denton and an arbitrary ruling of the Board of Inquiry. See Appendix B, pp. xxxii-xxxiii.

Schumacher, was "very serious".[5] In so doing, the court explicitly relied on *ex parte* statements of Lt. Col. Wyse. Petitioner had originally sought the presence or deposition of Lt. Col. Wyse on all five charges, in that all charges were initiated by Lt. Col. Wyse.

ARGUMENT

I

PETITIONER WAS DEPRIVED OF HIS RIGHTS TO FUNDAMENTAL FAIRNESS AND TO CONFRONT AND CROSS-EXAMINE AN ESSENTIAL ADVERSE WITNESS, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In holding harmless the effect of Petitioner's deprivation of either the presence or deposition of Petitioner's major accusing witness, Lt. Col. Wyse, the Court of Appeals stated:

> "Wyse would obviously have been a hostile witness, and all too often cross-examination of such a witness only serves to strengthen the case against the cross-examiner's client. However, occasionally such cross-examination does produce the miracle that lawyers like to attribute to it, and *we cannot say with assurance that it would not have done so here.*" (Emphasis added) (See Appendix A, p. xiii.)

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[5]In the Petition for Rehearing by the Court of Appeals attention is called to the statements of Denton's Commanding General, James Edmundson, finding "no single act of conduct" to be serious, as concluded by the court. It is respectfully submitted that each reviewing body has been prejudiced or strongly influenced by the service's wording of charge 1(a) which relates primarily to serious, but unfounded, claims against Denton's acquaintance, rather than Denton himself. It is the possible violation of national security, rather than Denton's association per se which has tainted these entire proceedings.

The Court of Appeals explicitly recognized that the finding of disrespect toward Lt. Col. Wyse rested entirely on *ex parte* unsworn statements by that witness, but failed to recognize that the "very serious" finding of association with Schumacher rested on the same out-of-court information which Petitioner had no opportunity to confront. The Court's opinion explicitly refers to "several meetings with Col. Wyse at which Denton's association with Schumacher was discussed" (See Appendix A, pp. viii-ix) and in footnote 5 quotes an unsworn statement by Lt. Col. Wyse at which such association was discussed. Though not explicit in the opinion, the finding regarding Petitioner's failure to support his dependents was also influenced by statements of Lt. Col. Wyse, with whom petitioner was required to and did consult by applicable Air Force Regulations. As the instigator of each of the five charges against Petitioner, Lt. Col. Wyse was the primary and essential accusing witness whose absence undoubtedly prejudiced Petitioner's defense.

Petitioner submits that by its denigration of the importance of Petitioner's right to confront and cross-examine his principal adverse witness, the Court of Appeals has created a conflict with prior decisions of this court and has so far sanctioned a procedure inimical to accepted judicial standards as to call for the exercise of this court's powers of supervision.

As recognized by the courts below, the Sixth Amendment is applicable to administrative and regulatory proceedings such as those before the Board of Inquiry. *Greene v. McElroy,* 360 U.S. 474, 496-497. Where the

right to confront and cross-examine has been denied, "no amount of showing of want of prejudice would cure it." *Brookhart v. Janis,* 384 U.S. 1, 3. The Court of Appeals conceded that Petitioner had been deprived of his opportunity to cross-examine his accuser at least as to one of the findings and revealed that Petitioner was also deprived of this right on the one "very serious" finding of associating with an individual who had been convicted of treasonous activities. Yet the court affirmed Petitioner's discharge upon the assumption that the same result would have obtained even had he been able to confront Lt. Col. Wyse. Such an assumption effects an erosion upon fundamental constitutional precepts of a fair trial or hearing. In *Pointer v. Texas,* 380 U.S. 400 (1965), this court overturned a criminal conviction which had rested upon the *ex parte* testimony of a witness unavailable at the time of trial. In holding the right of cross-examination fundamental, the court stated:

> ". . . there are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." 380 U.S. at 405

Though a criminal case, *Pointer* cites *Greene* and conveys a broad directive concerning all accusatory hear-

ings required to be fair, including administrative hearings.

In *Greene,* this court decided even without recourse to the mandates of the Fifth and Sixth Amendments, that on the basis of "our traditional ideas of fair procedure,"

> ". . . in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive Petitioner of a job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." 360 U.S. at 508

Like the Petition in *Greene,* Petitioner was deprived of his employment based upon evidence from *ex parte* reports from a person whom the Petitioner was denied the right to question. Since *Greene* was decided, Congress has enacted statutes (10 U.S.C. §8791 *et seq.*) which explicitly provide for the confrontation of adverse witnesses, thus aggravating the denial to Petitioner herein of a fundamentally fair proceeding under the Fifth Amendment and the Sixth Amendment right to confront and cross-examine his accusing witness.

II

PETITIONER WAS DENIED A FAIR AND IMPARTIAL HEARING UNDER 10 U.S.C. § 8792(b), AND AIR FORCE REGULATIONS 36-2.

In *Greene v. McElroy, supra,* and *Vitarelli v. Seaton,* 359 U.S. 535 (1959), this court held that federal

employees were entitled to confront and cross-examine their accusing witnesses at administrative hearings regarding their job retention. In both cases, the employees had been dismissed for association with communists on the basis of *ex parte* reports by witnesses who were never produced. In every respect but the result in the Court of Appeals, Petitioner's case is analogous.

Petitioner was dismissed from the Air Force on the basis of five findings, two of which the Court of Appeals determined to be makeweight, but one of which it regards as "very serious"—Petitioner's association with a German citizen who had been convicted of treasonous activities. Thus, guilt by association is imputed to Petitioner, and justification for his discharge is derived from the serious nature of the crime, not from Petitioner's acts. The Court of Appeals conceded that one of the "makeweight" findings, standing alone, would have merited reversal because Petitioner "had no chance to cross-examine his accuser." But in upholding the dismissal on the basis of the remaining findings, the Court of Appeals made the same error as the courts below in *Greene* and *Vitarelli*: it based its decision on *ex parte* reports from a witness whom the dismissed employee was unable to confront. In *Vitarelli*, no witness was produced at the hearing, but reference was made to a named person from whom accusing information had been gleaned. In Petitioner's case, there is even stronger evidence that reports from Lt. Col. Wyse were used to find Petitioner responsible for associating with Schumacher. This association was the only

finding regarded as serious by the Court of Appeals. The Court of Appeals refers to two statements of Lt. Col. Wyse (quoting one of them in footnote 5 of the Opinion) which pertained to Petitioner's association with Schumacher and were used to dismiss Petitioner from the Air Force. The conclusion is inescapable that Petitioner was seriously prejudiced by the failure to produce or allow Petitioner's deposing Lt. Col. Wyse.

The decision of this court in *Greene* predated applicable statutes or regulations for such administrative hearings, and was based upon "traditional ideas of fair procedure." *Vitarelli* was decided on the basis of regulations giving an accused employee the right to cross-examine any witness offered (construed to include any person whose statement was offered against the employee).

Petitioner was dismissed pursuant to explicit regulatory proceedings under Air Force Regulations 36-2, by which he was entitled to: "a fair and impartial hearing before a Board of Inquiry" (10 U.S.C. §8792 (b); request the presence of pertinent witnesses (AFR 36-2, 24(c)); submit depositions (AFR 36-2, 24(d)); and "question any witness brought before the Board of Inquiry" (AFR 36-2, 24(f)). *Vitarelli* made clear that a ruling giving the right to cross-examine a witness is violated when the witness is not physically produced at the hearing.

The only ruling of this court based upon the particular regulations above refine *Greene* and *Vitarelli* only to the extent of imposing an initial burden on

the Petitioner to make a timely and sufficient attempt to obtain the presence of adverse witnesses.[6] *Williams v. Zuckert,* 372 U.S. 765 (1963), on rehearing from 371 U.S. 531 (1963). Petitioner was notified that the Air Force would produce material and available witnesses and he requested the presence of Lt. Col. Wyse on the day following receipt of notification of his right to do so. He requested the opportunity to depose Lt. Col. Wyse in the United States immediately upon learning of his unavailability as a witness. Petitioner was never provided a response to his request to go to the United States to depose Lt. Col. Wyse. Without even referring to Petitioner's conformity with regulations, the Court of Appeals conceded Petitioner had been deprived of the opportunity to cross-examine this witness.

The Court of Appeals has imposed a harmless error rule upon three decisions of this court—*Greene, Vitarelli* and *Williams*—which mandate reversal for the denial of the right to cross-examine one's accuser. Petitioner respectfully requests that this court issue a Writ for the dual reason that the opinion below reveals that the error was not harmless and misapplies the rulings of this court *requiring* reversal if a witness is not presented for cross-examination to an accused federal employee who has made a timely and proper request therefor.

[6]It was on this issue that the District Court granted Summary Judgment, asserting that "plaintiff failed to discharge the initial burden of attempting to produce those witnesses which he felt were necessary for the presentation of his case." See Appendix B, headnote [4] p. 285, as justification for the Board of Inquiry's refusal to produce Lt. Col. Wyse or permit his deposition. This conclusion was apparently found erroneous by the Court of Appeals.

CONCLUSION

For each of the reasons given in the above argument, Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

Dated, San Francisco, California,
October 5, 1973.

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Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Jere L. Denton, Plaintiff-Appellant, vs. Secretary of the Air Force, Defendant-Appellee.	No. 26,565

[June 8, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, DUNIWAY, and GOODWIN,
Circuit Judges.

OPINION

DUNIWAY, Circuit Judge:

Denton, a former Air Force Captain, appeals from a summary judgment against him. The action was for a declaration that his discharge from the Air Force "under honorable conditions" was illegal, and for the recovery of pay and emoluments of office since the discharge. The court heard the action on the administrative record. We affirm.

1. *The Administrative Proceedings.*

Denton was stationed in Germany. In February, 1964, he was informed by his Commanding General that he was recommending action under Air Force Regulation 36-2[1] to effectuate Denton's discharge. Four allegations were the basis of the recommendation: (1) wrongfully cohabiting with a woman not his wife, he being then married; (2) having in his possession numerous obscene photographs; (3) failing to provide, without good cause, timely and adequate financial support to his legal dependents; and (4) continuing to associate with a person known by him to be a confessed and convicted agent of a communist government. On March 16, Denton responded, denying that the matters charged were of such importance that he should be separated from the service. On May 6, a Selection Board found that on the basis of the record before it Denton should show cause why he should be retained in the Air Force. On May 21, Denton was informed of this action by letter accompanied by a "Statement of Reasons" which set out the same four allegations, together with another, (5) that on or about December 2, 1963, he had exhibited a defective attitude and behaved himself with disrespect toward his commanding officer, Lt. Colonel Wyse. This was based on an unsworn statement of Wyse.

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[1]AFR 36-2 establishes, *inter alia*, criteria for identifying officers of the Air Force serving in active military service who, because of evidence of unfitness or unacceptable conduct, should be required to show cause for retention in the Air Force.

At Denton's request, a Board of Inquiry [the Board] was ordered convened. On July 1, Denton was notified that the Board would meet on July 16, and that he could request the presence of any witness whose testimony he believed to be pertinent. On July 10, Denton asked for a postponement, and that Wyse appear as a witness before the Board. A postponement until July 30 was granted. Wyse had earlier (July 4) been rotated back to the United States. Inquiry by the Board of Wyse's superiors in the United States resulted in advice that Wyse would not be available to return to Germany to appear as a witness. On July 23, Denton requested a further delay until Wyse would be available, or permission to travel to the United States to take Wyse's oral deposition. Both requests were denied, but the convening date of the Board was postponed until August 12.

The Board met on August 12. After a hearing, it recommended that Denton be separated from the Air Force, and be given a general discharge (under honorable conditions).[2] The Board based its recommendations on five findings:

1. The Board finds that Captain Jere L. Denton, AO2227733, did conduct himself in a manner incompatible with exemplary standards of personal conduct, character and integrity, as is evidenced by his recurrent misconduct in that:

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[2]It has been held that, because the vast majority of military discharges are honorable, anything less than an honorable discharge stigmatizes the recipient and is punitive in nature. *Bland v. Connally*, D.C. Cir., 1961, 293 F.2d 852.

a. He did not during the period 1 October 1963 to 31 December 1963 maintain a close continuing association with an individual known to him to have been convicted of the crime of conspiracy to commit treason against the Federal Republic of Germany, as set forth in paragraph 1a of the Statement of Reasons, but did during the period 29 October 1962 to about 1 December 1963, maintain a close and continuing association with one Herbert Schumacher, an individual known to him to be a confessed agent of the MFS, an East German Intelligence Agency; such association casting a highly unfavorable reflection upon the United States Air Force, as well as constituting a violation of a lawful regulation.

b. He did wrongfully and unlawfully cohabit and engage in adulterous intercourse with Ann Mattson, a woman not his wife, he being at that time married to another woman, such wrongful cohabitation being open and notorious, as set forth in paragraph 1b of the Statement of Reasons, but during the period 4 September 1962 to about 28 January 1963, rather than the dates specified in the Statement of Reasons.

c. He did on or about 2 December 1963, exhibit a defective attitude and behave himself with disrespect toward his Commander, Lt. Col. James M. Wyse as set forth in paragraph 1c of the Statement of Reasons.

d. He did on or about 29 October 1962, have in his possession in his BOQ room in Rothwesten, Germany, a number of obscene photographs as set forth in paragraph 1d of the Statement of Reasons.

2. The Board finds that Captain Jere L. Denton, AO2227733, did mismanage his personal affairs as set forth in paragraph 2 of the Statement of Reasons [failing to provide, without good cause, timely and adequate financial support to his dependents].

This recommendation was affirmed by an Air Force Board of Review on November 5, and on December 3, by the Judge Advocate General, USAF. On December 22, 1964, the Secretary of the Air Force ordered Denton discharged, effective January 26, 1965. On March 22, 1968, Denton applied, under 10 U.S.C. § 1552, to the Air Force Board for the Correction of Military Records for relief from the discharge on grounds of error and injustice. On May 23, 1968, that Board denied his application. This action was filed March 14, 1969.

2. *Jurisdiction.*

Although the Secretary does not urge that the district court or this court lacks jurisdiction, we consider the question because of our decision in *Arnheiter v. Chafee,* 9 Cir., 1970, 435 F.2d 691, *aff'g Arnheiter v. Ignatius,* N.D.Cal., 1968, 292 F.Supp. 911. There we held that the courts do not have jurisdiction to review a decision of the Navy to relieve an officer from command of a ship. We relied upon the famous dictum in *Orloff v. Willoughby,* 1953, 345 U.S. 83, that "judges are not given the task of running the Army." (345 U.S. at 93). However, we conclude that *Arnheiter* is not applicable here. It related

to a matter strictly internal to the Armed Forces—a duty order. So did *Orloff*. The present case differs; it deals with a discharge, an action that deprives the affected officer of his livelihood and, when not "honorable," can seriously hamper his civilian career. In at least one discharge case, the Supreme Court has exercised jurisdiction and invalidated a discharge on the ground that the Secretary had exceeded his statutory powers. *Harmon v. Brucker,* 1958, 355 U.S. 579. *See also Marshall v. Brucker,* 1958, 356 U.S. 24. The Court has not, so far as we can discover, spoken directly to this question since.

The question presented here differs from that in *Harmon, supra.* Denton does not assert the kind of misinterpretation of statutory authority that existed in *Harmon.* His claim is, essentially, that the Air Force Regulations (AFR) guarantee him a fair hearing,[3] and that he did not get one, for a number of reasons. He relies on the general rule, stated and applied in such cases as *Vitarelli v. Seaton,* 1959, 359 U.S. 535; *Service v. Dulles,* 1957, 354 U.S. 363; and *Powell v. Zuckert,* D.C.Cir., 1966, 366 F.2d 634, that administrative decisions are subject to review, and can be judicially held invalid, on the ground that the

[3]AFR 36-2 was promulgated pursuant to statutory provisions for separation of officers from the regular Air Force, 10 U.S.C. §§ 8791, *et seq.*, and for separation of reserve officers, 10 U.S.C. §§ 1162-63. Section 8792 (separation of regular Air Force officers) entitles the officer to a "fair and impartial" hearing; there is no similar provision for reserve officers in 10 U.S.C. §§ 1162-63. Because Denton was a reserve officer, this statutory guarantee does not apply to him. However, AFR 36-2 applies to both regular and reserve officers, and thus is applicable to Denton. AFR 36-2 reiterates the guarantee of a "fair and impartial" hearing.

Secretary has failed to follow his own valid regulations. We hold that we have jurisdiction. A number of other circuits have come to the same conclusion: *Mindes v. Seamans,* 5 Cir., 1971, 453 F.2d 197; *Feliciano v. Laird,* 2 Cir., 1970, 426 F.2d 424; *Van Bourg v. Nitze,* D.C. Cir., 1967, 388 F.2d 557; *Dunmar v. Ailes,* D.C.Cir., 1965, 348 F.2d 51. *See also Schwartz v. Covington,* 9 Cir., 1965, 341 F.2d 537, 538, n. 1; *Crayeroft v. Ferrall,* 9 Cir., 1969, 408 F.2d 587.

3. *The Scope of Review.*

The federal courts do not sit to run the Air Force, or, except possibly in an extreme case, to tell it on what grounds it may or may not discharge an Air Force officer. The Air Force is entitled to discharge an officer on grounds rationally related to the standards of fitness for retention in that branch of the service.

The question before us is, did Denton get the fair hearing that the Air Force regulations require? We consider Denton's arguments seriatum.

4. *Finding 1a—association with Schumacher.*

The facts are not in dispute. Denton met Schumacher in 1961 and became a good friend of Schumacher and his family. In April of 1962, Schumacher and one Straube made contact in East Germany with two persons acting on behalf of the MFS, an East German intelligence organization. They received about $200 each, for which they were to obtain information relating to the activities of the CIC (Counter-Intelli-

gence Corps) and its employees in Kassel, Germany. Neither Straube nor Schumacher followed through on these plans. In July of 1962 they voluntarily disclosed their activities to German and United States authorities, and they were eventually convicted of "treasonable relations." ("Treasonable relations" is a minor crime, as opposed to "treason" which is a major crime.) Schumacher was sentenced to six months in prison.

On October 29, 1962, Denton was interviewed by a special agent of the Office of Special Investigations [OSI] who was investigating Schumacher's relationships with Americans. He explicitly told Denton of Schumacher's activities. However, Denton decided that Schumacher's activities were not quite as serious as the agent had indicated, and he continued his close association with Schumacher. During 1963 Denton had several meetings with Col. Wyse at which Denton's association with Schumacher was discussed. Wyse felt that AFR 205-57[4] was applicable. Denton disagreed, feeling that he was violating no Air Force regulation, and continued to associate with Schumacher. Then, on December 2, 1963, Denton again met with Wyse and the subject of his association with Schumacher again arose. This meeting was described in Wyse's statement of December 3, 1963. In what we consider the

[4]AFR 205-57 requires that each Air Force member must notify his commander immediately upon becoming aware of contacts, whether intentional or by change, of an Air Force member (including himself) or his dependent with individuals or representatives or employees of organizations of foreign governments whose activities or interests are hostile to, against the best interests of, or may be harmful to the United States.

important respects, Denton's version of the meeting does not differ from Wyse's. What is undeniably clear is that at this meeting Denton was told unequivocally by Wyse that his longtime friendship with Schumacher, which had continued despite several meetings with Wyse on the subject, was in Wyse's opinion highly suspect, that Denton disagreed and indicated he would continue to see Schumacher, and that Denton did in fact continue to see Schumacher.

Denton argues that finding 1a is not supported by substantial evidence. The argument is without merit.

He also argues that action under AFR 36-2 with respect to findings 1a and 1c had first to be approved under the provisions of AFR 35-62. Under ¶4(f) of AFR 36-2 proceedings based upon qualifications regarding national security must have first been approved under AFR 35-62. Thereafter, if warranted, proceedings under AFR 36-2 are held. Denton argues that findings 1a and 1c relate to questions of national security, and the Board should not have made findings regarding those allegations until further proceedings had been approved under AFR 35-62. We do not think that finding 1c is related to national security, and therefore we treat Denton's argument only with respect to finding 1a.

Paragraph 3(f) of AFR 35-62 provides that that regulation will not be used where security is not the primary consideration. Here, action under AFR 36-2 was taken on the basis of five allegations. Only one dealt with security qualifications. Therefore, under the language of ¶3(f) of AFR 35-62, the Air Force could

reasonably conclude that it need not proceed under that regulation.

Denton next argues that under paragraph 10 of AFR 36-2 the Board was required to follow the provisions of AFR 124-4, which it did not do. AFR 124-4 deals with the handling of OSI reports. More specifically, ¶9(d) of that regulation provides that OSI reports are not to be introduced in evidence in proceedings such as the one here, and prohibits furnishing OSI reports to Article 32 investigating officers. Denton does not argue that an OSI report itself was in evidence before the Board. However, an Article 32 Investigating Officer's report (concerning Article 32 charges brought against Denton for unlawful cohabitation) was in evidence before the Board. The Investigating Officer had evidently at one point been shown part or all of the OSI report concerning Denton's relationship with Schumacher. Assuming that this was so, it may have been a security violation under AFR 124-4. However, we cannot see how this circumstance is relevant to the use as evidence of the Article 32 Investigating Officer's report. We see no merit in this argument.

Denton argues that the Board improperly considered the statements of Captains Wolff and Hummel. These statements were both part of the Article 32 Investigating Officer's report which were before the Board. One of them relates to finding 1b, and we consider it *infra*. The other, that of Captain Hummel, outlined the results of the legal action taken against Schumacher. He stated that Schumacher had been

found guilty of "treason," and had been sentenced to ten months in prison. Denton offered no rebuttal before the Board. However, he later submitted to the Board of Review an affidavit of one Henry F. Waldstein, a member of the West German bar. He contradicted the Hummel statement in two respects. He stated that Schumacher had been convicted of "treasonable relations," not "treason," and that Schumacher had been sentenced to six months in prison, not ten months. Denton argues that by virtue of the errors in the Hummel statement, the Board was misled when considering finding 1a, and that its finding was consequently prejudiced. The four-month difference in the length of the sentence we think irrelevant. Hummel's characterization of Schumacher's crime as "treason" as opposed to "treasonable relations" is not significant. The Board found that Denton maintained "a close and continuing association with . . . an individual known by him to be a confessed agent of the MFS. . . ." Schumacher's actual crime, "treasonable relations," supports finding 1a.

Denton argues that finding 1a is fatally vague in that the "lawful regulation" which it is alleged Denton violated was never specified. The argument is frivolous. From the record there is no doubt that Denton was aware that AFR 205-57 was being referred to.

5. *Finding 1b—unlawful cohabitation*

This finding is not seriously attacked—nor could it be. It is amply supported by the record.

In the statement of Captain Wolff, there is a discussion of Denton's alleged relationship with German women and his use of his apartment in that connection. Wolff was of the opinion that no one particular woman lived there, but that Denton kept the apartment to entertain various German women. It is clear that this statement did not prejudice Denton with respect to the only issue it concerned—the alleged wrongful cohabitation with a particular woman. The statement does contain hearsay. However, the Board is not required to follow strict rules of evidence, and because we can see no prejudice here, we find no error.

6. *Finding 1c—disrespect toward Col. Wyse.*

This finding is based entirely upon the unsworn statement of Col. Wyse, the relevant contents of which are set out in the margin.[5] Denton argues that had he

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[5]"On 2 December 1963, at approximately 1130 hours, in my office at Sembach Air Base, Germany, I was approached by Captain Jere L. Denton, AO2227733, and he again renewed his request that I assist him in acquiring the return of some photographs of women in various stages of undress that are presently in the hands of the JAG. I told him that I would look into it. The conversation then revolved around his behavior and apparent lack of judgment in his associations. I informed him that it has been brought to my attention that he had spent a weekend in either late September or early October 1963 in the home of one Mr. Schumacher, a man who had been convicted as an agent of the East German Soviet Intelligence. This weekend referred to was at Kassel, Germany, where Captain Denton had previously undergone investigation on the same allegations. He readily admitted that he had spent the weekend there and indicated that he still considered Mr. Schumacher a good friend. When I informed him that this was in

had the opportunity to cross-examine Wyse he would have been able to convince the Board that the alleged disrespect was but a disagreement over the proper interpretation of an Air Force Regulation, that he had at all times maintained a respectful attitude toward Wyse, and that his remarks regarding his no longer wanting any part of the service were taken out of context and given undue emphasis. We cannot escape some skepticism about this argument. Wyse would obviously have been a hostile witness, and all too often cross-examination of such a witness only serves to strengthen the case against the cross examiner's client. However, occasionally such cross examination does produce the miracle that lawyers like to attribute to it, and we cannot say with assurance that it would not have done so here.

The only other evidence relating to finding 1c is an unsworn statement by Denton. In it, he does not really deny using the words that Wyse says he used. What he does say is that his statements related to what he believed to be the unfairness of the Air Force's attempt to control the lives of its members, and that he did not intend to indicate that he wanted out of the service. It is for the Air Force, not this

violation of AFR 205-57 and that the government frowned on behavior such as this, he remarked, 'Well, if the service is going to tell me who I can or cannot associate with, I want no part of the service'. I then told him that I would see if I couldn't oblige him. I also informed him that if my guess was right that he also spent time in the Schumacher home over the Thanksgiving weekend. He readily admitted that he did. Neither of these visits was reported to me by Captain Denton, as required by regulation, and when I told him that he was violating regulations by associating with known agents of a government unfriendly to the United States, he stated that he 'would like to see them'."

court, to say whether the words used were incompatible with Denton's duty toward his superior.

Nevertheless, if finding 1c stood alone, we might well reverse because Denton had no chance to cross examine Wyse. *See Greene v. McElroy,* 1959, 360 U.S. 474, 508. However, it is but one of five findings, and, for reasons stated *infra,* we hold that the decision must be upheld on the basis of other findings.

7. *Finding 1d—possession of obscene photographs.*

There is no question that Denton possessed the photographs; he took them himself. He argues that they are not obscene, citing recent Supreme Court cases. We certainly do not find them shocking. But we also think that this ground for discharge is a makeweight, and that the Board would have reached the same result without it. See the discussion, *infra.*

8. *Finding 2—failure to provide for dependents.*

The evidence on this question is in conflict, but there was sufficient evidence to support the finding. We do not sit to retry the question, and it makes no difference that, if we had been the Board, we might have found the other way.

9. *The effect of the doubtful validity of findings 1c and 1d.*

For the purpose of this discussion, we assume that findings 1c and 1d cannot stand, 1c because it is based entirely upon unsworn hearsay and Denton had no chance to cross examine his accuser, and 1d because

the photographs are not obscene. It does not follow from this that the judgment must be reversed.

When a court finds error in a finding of an administrative body, this does not lead to automatic reversal. Reversal follows if the court has substantial doubt that the same result would have been reached if the questioned finding had not been made. *Fairmont Foods Co. v. Hardin,* D.C.Cir., 1971, 442 F.2d 762, 770-71; *Tashof v. FTC,* D.C.Cir., 1970, 437 F.2d 707, 713; *NLRB v. Reed & Prince Mfg. Co.,* 1 Cir., 1953, 205 F.2d 131, 139; *see generally Braniff Airways, Inc., v. CAB,* D.C. Cir., 1967, 379 F.2d 453.

Here the Board's recommendation was based upon five separate matters, each a ground for the action recommended. At least one of them, finding 1a, appears, even to this non-military body, to be very serious. In addition, the original initiating action did not mention disrespect to Col. Wyse. That ground, like 1d, appears to be a makeweight. Under the circumstances, we have no doubt that the Board would have made the same recommendation if it had found the other way in findings 1c and 1d.

10. *Double jeopardy.*

Denton's final argument is that, in charging him with unlawful cohabitation, the Air Force subjected him to double jeopardy. The basis of the argument is that he had earlier accepted nonjudicial punishment under Article 15, UCMJ (10 U.S.C. §815) for wrongful cohabitation, and was therefore subjected, in violation of the Federal Constitution, to double jeopardy

when his general discharge was based in part on this same cohabitation. The Board of Inquiry proceedings, however, were administrative in nature, conducted to determine the fitness of an officer for retention in the Air Force. Paragraph 3b of AFR 36-2 provides that, "[R]ecurrent misconduct is a basis for initiation of action under this regulation when the officer has by the pattern of his actions raised serious doubt regarding his fitness for retention, regardless of whether such misconduct has or has not resulted in prior judicial or nonjudicial punishment." In following this provision of the regulation, the Air Force was not subjecting Denton to double jeopardy as prohibited by Federal Constitution.

Second, Denton argues that under Article 15, UCMJ, punishment for an act or omission which is not a serious crime is a bar to further prosecution. The statute provides that punishment imposed is not a bar to a subsequent court martial for a serious crime or offense growing out of the same act or omission. Appellant argues that by implication the punishment is a bar to further prosecution for an offense which is not serious. This argument is misplaced. We are not dealing here with a subsequent court martial, and the statute is inapplicable. Denton was separated from the Air Force for "recurrent misconduct" which consisted of several elements, and it was proper for the Board to consider the unlawful cohabitation, for which Denton had admittedly been punished, as evidence of such misconduct.

Affirmed.

Appendix B

DENTON v. SEAMANS

Cite as 315 F.Supp. 279 (1970)

Jere L. DENTON, Plaintiff,

v.

Robert C. SEAMANS, Secretary of the Air Force, Pentagon, Washington, D. C., Defendant.

No. C-50957.

United States District Court, N. D. California.

July 1, 1970.

Suit by former Air Force officer for declaration that general discharge under honorable conditions was illegal and for pay and emoluments of his office since that date. On motion of defendant Secretary of the Air Force for dismissal or for summary judgment, the District Court, Sweigert, J., held that failure of Air Force to produce such officer's commanding officer before Board of Inquiry did not deprive officer of fair and impartial hearing, though statement of commanding officer was admitted and considered, where officer was fully notified of all charges and statements against him, including the sources thereof, failed to make any effort whatsoever on his own behalf to obtain either commanding officer's presence or his statement, and failed to request that Air Force make such effort until some five months after he was fully notified of charges against him.

Motion for summary judgment granted.

1. **Federal Civil Procedure ⇐901**

Insufficiency of complaint, which contained only conclusory allegations to the effect that discharge of Air Force officer was illegal for reasons set forth in brief, which referred to administrative record which was never filed by plaintiff-officer, was cured, where administrative record was filed by defendant Secretary of the Air Force.

2. **Armed Services ⇐11**

No judicial relief is available from action of Board for Correction of Military Records concerning correction of discharge errors or injustices, absent showing that the action was arbitrary or capricious or was unsupported by substantial evidence. 10 U.S.C.A. § 1552.

3. **Armed Services ⇐11**

Constitutional right to confrontation with witnesses and compulsory process for obtaining witnesses applied to proceeding before Board of Inquiry with respect to discharge of Air Force officer. 10 U.S.C.A. §§ 8791-8796; U.S.C.A. Const. Amend. 6.

4. **Armed Services ⇐11**

Prior to hearing before Board of Inquiry as to whether Air Force officer should be discharged, burden was upon officer to make timely and sufficient attempt to obtain presence of all witnesses he desired or, if his failure to do so was justified, to make proper and timely demand upon the Air Force for production of witnesses; and without such demand, there was no requirement that witnesses requested by officer be produced.

5. **Armed Services** ⇐11

In hearing before Board of Inquiry as to whether Air Force officer should be discharged, failure of Air Force to produce such officer's commanding officer did not deprive such officer of fair and impartial hearing, though statement of commanding officer was admitted and considered, where officer was fully notified of all charges and statements against him, including the sources thereof, failed to make any effort whatsoever on his own behalf to obtain either commanding officer's presence or his statement, and did not request that Air Force make such effort until almost five months after he was fully notified of the charges against him.

6. **Searches and Seizures** ⇐7(1)

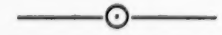
Protections of Fourth Amendment are applicable to administrative discharge proceedings. U.S.C.A. Const. Amend. 4.

7. **Searches and Seizures** ⇐7(10)

Search of Air Force officer's bachelor quarters and seizure of photographs therein were reasonable, where search was ordered by officer's commanding officer after he had been advised of such officer's association with suspected East German agent, and where photographs seized, consisting of snapshots of women in various stages of undress and in various suggestive poses, were evidence of improper conduct on part of such officer. U.S.C.A. Const. Amend. 4.

8. Armed Services ⇐11

Photographs of women in various stages of undress and in various suggestive poses, found in Air Force officer's quarters and apparently taken therein, were properly before Board of Inquiry on hearing as to whether such officer should be discharged, regardless of whether or not they were correctly found to be obscene, as photographs were evidence of misconduct and officer was discharged for recurrent misconduct and not for possession of obscene photographs.



Stern, Stotter & Rosenberg, San Francisco, Cal., for plaintiff.

Asst. U. S. Atty. Steven Kazan, San Francisco, Cal., for defendant.

MEMORANDUM OF DECISION

SWEIGERT, District Judge.

This suit is brought by plaintiff, a former Air Force Captain, against the Secretary of the Air Force for a declaration that his general discharge certificate (under honorable conditions) was illegal and of no effect and for pay and emoluments of the office since that date.

The record shows that plaintiff's discharge resulted from a Board of Inquiry proceeding convened in Germany on August 12-13, 1964, under 10 U.S.C. § 8791 et seq. and Air Force Regulations 36-2. The Board of Inquiry proceedings were thereafter reviewed and af-

firmed as provided by the statute and the discharge by the Secretary of the Air Force followed on January 26, 1965.

Thereafter, on March 22, 1968, plaintiff applied, pursuant to 10 U.S.C. § 1552, to the Air Force Board For The Correction of Military Records for relief from the discharge on grounds of error and injustice. On May 23, 1968, that Board denied plaintiff's application. This suit was commenced March 14, 1969.

[1] The complaint alleges[1] that the proceedings were illegal for various reasons hereinafter set forth.

The case is now before the court on motion of the defendant Secretary for dismissal or in the alternative for summary judgment based on the certified administrative record filed by counsel for defendant.

The record shows that plaintiff was charged with and discharged for (1) Improper association with one Schumacher, an alleged agent of East German Intelligence Service (Finding 1(a)); (2) Cohabitation and adultery with a woman not his wife, he being married (Finding 1(b)); (3) Improper attitude toward his Commander, Lt. Col. Wyse (Finding 1(c)); (4) Possession of obscene photographs in his Air Force quar-

[1]The complaint contains only conclusionary allegations to the effect that "the discharge of plaintiff was illegal for the reasons set forth in detail in Exhibit A." Exhibit A is merely a copy of plaintiff's argumentative application or brief before the Air Force Board For The Correction of Military Records. It makes reference to the administrative record but plaintiff never filed that record with the court. However, we consider this obvious insufficiency of the complaint to have been cured for practical purposes by the filing of the administrative record by the defendant. Our ruling will be made on that record.

ters; (5) Mismanagement of his personal affairs (Finding 2); said charges all allegedly being in violation of the applicable regulations.

DENIAL OF CONFRONTATION AND CROSS-EXAMINATION

Plaintiff's first contention is that the Board improperly admitted into evidence and considered a statement of his commanding officer Lt. Col. Wyse without granting plaintiff's request for delay of the hearing to take depositions of Wyse or until Wyse would be available to testify.

The statute under which the Air Force Board of Inquiry was held (10 U.S.C. §§ 8791-8796), provides in effect that the Secretary of the Air Force may convene a board of officers to review the record of any commissioned officer to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list (§ 8791); that such officer shall be given a fair and impartial hearing; that the officer shall be notified in writing of the charges against him at least 30 days before hearing and allowed reasonable time, as determined by the Board of Inquiry under regulations of the Secretary, to prepare his defense and allowed to appear in person and by counsel before the Board and allowed full access to and furnished copies of records relevant to his case (§ 8795); that if the Board of Inquiry determines that the officer has failed to establish that he

should be retained, it shall send the record to a board of review (§§ 8792, 8793); that the Secretary may remove an officer from the active list if his removal is recommended by a board of review and the Secretary's action in such a case is final and conclusive.

On the subject of "witnesses" the pertinent regulations AFR 36-2 (Par. 24 (c)), provide that the officer under charges may request the appearance of any witness whose testimony he believes to be pertinent to his case, specifying in his request the type of information the witness can provide, and the Board will invite the witnes to attend if it considers that the witness is reasonably available and that his testimony can add materially to the case (Par. 24(c)).

Further, on that subject, Paragraph 26(d) provides that the Board should invite witnesses to appear if reasonably available and, if in the Board's opinion, their testimony is essential or will contribute materially to the case, Art. 49 USMJ (10 U.S.C. § 849) being used as a general guide in determining availability. The use of affidavits or depositions to obtain testimony of witnesses who are not reasonably available is encouraged. Further, Paragraph 26(d) (2) provides how the Board may request the appearance of members of the Air Force in active military service.

On the subject of "evidence" the pertinent regulations AFR 36-2 (Par. 24(d)), provide that the officer may submit depositions or unsworn statements, certificates or affidavits for the consideration of the Board of Inquiry and, further, Paragraph 24(f), he may question any witness brought before the Board.

Paragraph 26 provides that strict rules of evidence will not be followed but reasonable bounds of relevancy, competency and materiality should be maintained.

On the subject of delay of the hearing Paragraph 26(d) provides that the officer under charges, within 5 calendar days after receipt of notice of place and date of hearing, may request that the hearing be delayed for a specific period of time, normally not more than 15 calendar days; that a delay of more than 15 days will not be granted unless denial will prejudice the rights of the respondent; that requests for delay must clearly establish that the delay is essential for respondent to prepare his case. The Board President will forward any request for delay of more than 15 days to the Major Commander who may approve requests up to 30 days, but, if he disapproves, he in turn will forward it to Air Force Headquarters for final decision.

The record on this point shows that plaintiff was notified as early as February 13, 1964, that he was being recommended for elimination under AFR 36-2 and was furnished with a copy of the letter of recommendation with the evidence in support of the reasons for recommendation attached; his request for a 28 day delay "to obtain statements from certain individuals who live within the United States" was granted to the extent of 15 days under AFR 36-2, par. 14; on March 16th plaintiff filed his rebuttal; on May 6th a selection board recommended that plaintiff be required to show cause for retention and on May

20th the Commander-in-Chief, Air Force Europe, approved; on May 21st plaintiff was so notified and was again furnished a copy of the elimination recommendation and a copy of the selection board report; on June 2d plaintiff stated his intention of appearing before a Board of Inquiry, acknowledged having counsel and stated his full understanding of the procedures involved and of his rights and options; on July 1st plaintiff was notified of hearing scheduled for July 16th; on July 10th plaintiff requested a 15 day delay to July 31st which was granted, and also requested the appearance of Lt. Col. Wyse as a witness; on July 21st plaintiff acknowledged advice of Lt. Col. Wyse's unavailability (Wyse having departed Germany on July 4th for normal return to the United States) and suggested his deposition be taken or in the alternative requested that plaintiff and his counsel be permitted to return to the United States for oral deposition of Wyse or a delay until Wyse would be available to appear and testify; on July 27th plaintiff acknowledged notice of a further continuance of the hearing to August 12th; on July 29th plaintiff was notified that August 12th was a firm date, citing the previous postponements of the hearing and stating there was inadequate justification for further delay.

On August 12th the Board of Inquiry convened, the hearing concluded on August 13th and the Board made its findings and a recommendation that plaintiff be discharged by general discharge certificate without readjustment pay.

On this record this court is called upon to review the final decision of the Air Force Board For the Correction of Military Records—a board created under 10 U.S.C. §§ 1552, 1553.

[2] It has been held that we may inquire into allegedly wrongful refusal of such a Board of Corrections to grant deserved relief concerning the correction of discharge errors or injustices and that we may determine whether the Correction Board has acted within the sphere of its statutory and constitutional authority. (Van Bourg v. Nitze, 128 U.S.App. D.C. 301, 388 F.2d 557, 563 (1967)). It is the law of this circuit that no judicial relief from action of such a Board for Correction of Military Records is available in the absence of a showing that the action was arbitrary or capricious or was unsupported by substantial evidence. Sanford v. United States, 399 F.2d 693 (9th Cir. 1968).

It has been held that, since the vast majority of military discharges are honorable, anything less than an honorable discharge stigmatizes the recipient and is punitive in nature. Bland v. Connolly, 110 U.S.App. D.C. 375, 293 F.2d 852 (1961); Van Bourg v. Nitze, supra, 388 F.2d at 559. In the present case the plaintiff's discharge was not characterized as less than honorable. On the contrary, it was characterized as a general discharge "under honorable conditions".

AFR 36-2, Par. 7, expressly provides that, except under special determination of the Secretary, the officer will be discharged "under honorable conditions" and furnished a General Discharge Certificate.

It is difficult to understand how such a discharge could be considered as a stigmatization of plaintiff or as punitive. Since, however, that point is not urged by defendant we will assume that it is such and will so regard it for the purpose of this case.

In Brown v. Gamage, 126 U.S.App.D.C. 269, 377 F.2d 154 (1967) involving the same statute and regulations as in the present case, the record showed that ex parte statements had been introduced at the Air Force Board of Inquiry hearing—four from retired Air Force personnel (over which the Air Force had no power of subpoena) and one from an active duty Air Force Colonel on foreign duty (but over whom the Air Force had subpoena control). Although the court found that these statements could have affected the decision, it held (citing Williams v. Zuckert, 372 U.S. 765, 83 S.Ct. 1102, 10 L.Ed.2d 136 (1963) that their use in evidence without production of the witnesses for confrontation and cross-examination, did not invalidate the discharge proceedings because, although plaintiff had received the file of which the questioned ex parte statements were a part (together with the names and addresses of the five witnesses whose statements were used) and although plaintiff had been granted adjournments to prepare his defense, plaintiff did not (until at the hearing) request the assistance of the Air Force in obtaining the presence of the only witness over which the Air Force had control. Nor did he request assistance in taking the depositions of the other four witnesses over which there was no Air Force subpoena control.

In Williams v. Zuckert, 371 U.S. 531, 83 S.Ct. 403, 9 L.Ed.2d 486 (1963) and 372 U.S. 765, 83 S.Ct. 1102, 10 L.Ed.2d 136 (1963) a discharged civilian member of the Air Force claimed he was denied right of confrontation and cross-examination of witnesses whose affidavits had been used at a Civil Service Commission hearing. The Supreme Court, noting that the regulations contemplated that the petitioner had the initial burden of making timely and sufficient attempts to obtain the presence of the witnesses in question, recognized there was an issue whether petitioner had met such initial burden or was, under the circumstances and without fault of his own, justified in failing to so attempt and, if so, whether petitioner made timely and proper demand on the Air Force so that it was required to produce the witnesses for examination.

On the other hand, in Grimm v. Brown, 291 F.Supp. 1011 (N.D.Cal.1968), the only other case involving these same regulations, this district granted relief where the record showed that the Air Force Board of Inquiry failed to provide the respondent officer with a copy of a certain unclassified summary of an OSI report, as required by AFR 36-2, Par. 11c, and that the report was basic to a charge that the respondent had engaged in discussion of classified subjects with certain persons resulting in the OSI investigation and a reprimand. The court held the finding of guilt on this charge was invalid and, further, that the finding was so interwoven with other findings, that summary judgment should be granted for plaintiff in that case.

In Powell v. Zuckert, 125 U.S.App.D.C. 55, 366 F.2d 634 (1966) a civilian employee sought judicial review of his discharge for alleged violation of an Air Force regulation. The court held, among other things, that proceedings under Air Force grievance procedures (affirmed on administrative review) were invalid in that certain charges had been established, over objections, by affidavit of a witness who was not produced at the hearing. Applicable regulations provided that employees had the right to question any person who testified at the hearing; that the employee would be supplied with a list of the witnesses but that, if a witness was unavailable, a signed statement could be received in view of live testimony. The court, distinguishing Williams v. Zuckert, 372 U.S. 765, 83 S.Ct. 1102, 10 L.Ed.2d 136 and citing Vitarelli v. Seaton, 359 U.S. 535, 545, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959), noted that, although the particular witness was not available in the sense that she could have been compelled to attend the hearing, the board could have invited or requested her attendance but made no effort to produce her and had not informed plaintiff she would be used.

In Brown v. Zuckert, 349 F.2d 461 (7th Cir. 1966) a civilian employee of the Air Force had been discharged for violation of safety practice regulations and sought review by the Civil Service Commission as provided in 5 U.S.C. § 6526 and 5 U.S.C. § 863 (Veterans Preference Act). The employee had requested that individuals who had signed statements

attesting to his violation of the safety regulations, be present at the hearing for cross-examination. The witnesses were not produced.

Civil Service Regulations (5 CFR 22.603-22.607) provide that opportunity will be afforded for the cross-examination of witnesses but that the Commission is not authorized to subpoena witnesses and that the employee must make his own arrangements for the appearance of witnesses. The court, citing Williams v. Zuckert, 371 U.S. 531, 83 S.Ct. 403, 9 L.Ed.2d 486 (1963) held that the employee must do something more than merely notify the agency that he desires certain witnesses; that the employee has the initial burden of attempting to contact and arrange for witnesses' attendance at the hearing and that, only after this initial burden is discharged, is he entitled to have the agency (in that case the Air Force) attempt to produce the witnesses; that under the regulations and the decisions, the employee, who had made no attempt to arrange for the witnesses, could not be said to have been deprived of his procedural rights; that defendant was entitled to summary judgment.[2]

[3] Defendant, citing Bailey v. Richardson, 86 U.S.App.D.C. 248, 182 F.2d 46 (1959), contends that 6th amendment protection-confrontation with wit-

[2]In Brown v. Zuckert, *supra*, a dissent was merely to the effect that on the particular record in that case summary judgment should not have ben granted but that a trial court hearing should be held as in Williams v. Zuckert, *supra*, on the issue whether the employee had met his burden of attempting to obtain the witnesses and, failing that, to request the Air Force to produce them.

nesses and compulsory process for obtaining witnesses —applies only to criminal prosecutions; that the proceeding here involved is a civil proceeding.

It has been held, however, Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1414, 3 L.Ed.2d 1377 (1958) that the right of confrontation and cross-examination exists "not only in criminal cases * * * but in all types of cases where administrative and regulatory actions were under scrutiny;" that, where government action seriously injures an individual and the reasonableness of the action depends on fact finding, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue; that this right, important in the case of documentary evidence, is even more important in the case of where the evidence consists of the testimony of individuals; that this protection has been formalized by the courts in the requirements for confrontation and cross-examination.

Defendant further contends that plaintiff's July 10th request for delay need not have been granted at all because it was not made within five days after plaintiff's admitted receipt of notice of hearing; that plaintiff's July 23rd request for further delay was not within Paragraph 26(c) because it was not for a specific period of time; that in any event, plaintiff had at least 152 days within which he could have made arrangements to depose or otherwise interrogate Lt. Col. Wyse but failed to do so, citing Brown v. Zuckert, *supra;* that the Board had the right under the circumstances to consider the statement of Lt. Col.

Wyse, which in any event was substantially corroborated, says defendant, by plaintiff's own evidence.

The question presented for review on this aspect of the case is whether the failure of the Air Force to produce Colonel Wyse at the hearing before the Board of Inquiry deprived plaintiff of the fair and impartial hearing to which he was entitled.

Under Air Force Regulation 36-2 para. 26(d) the Board of Inquiry is only required to invite witnesses to appear if the witnesses are reasonably available and if, *in the Board's opinion,* their testimony is essential or will contribute materially to the case. (emphasis added).

It is apparent that the Board did not consider the testimony of Colonel Wyse to be essential and, therefore, did not request his appearance.

[4] The burden then was upon plaintiff to make a timely and sufficient attempt to obtain the presence of all witnesses he desired. Regulation 36-2 para. 23(c); assuming plaintiff's failure to make such attempt was justified the burden remained upon plaintiff to make proper and timely demand upon the Air Force for the production of witnesses. Without such demand upon the Air Force there would be no requirement that the witnesses requested by plaintiff be produced. Brown v. Gamage, *supra,* 377 F.2d at 158-159; Williams v. Zuckert, *supra,* 372 U.S. at 765, 83 S.Ct. 1102.

[5] The record now before us establishes that plaintiff was fully notified of the charges against him, and of the evidence in support thereof (including the ex parte statement of Colonel Wyse), as early as Feb-

ruary 13, 1964; and yet, plaintiff did not attempt to take a statement of Colonel Wyse, nor, apparently, did he attempt to interview Wyse, prior to requesting his appearance on July 10, 1964.

It should be noted also that plaintiff filed a rebuttal to the charges against him with the Selection Board on March 16, 1964; and yet plaintiff did not seek to attach a statement or deposition of Colonel Wyse to his rebuttal although he had ample opportunity to do so, and although he attached statements from several other witnesses.

The primary concern in cases relating to administrative discharge has been to guarantee the element of "fairness" which is involved in full disclosure of charges and adverse statements with identification of the sources of those charged and statements so that the accused could effectively prepare a defense. Brown v. Gamage, *supra,* 377 F.2d at 158; Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1958); Greene v. McElroy, *supra.*

In the instant case plaintiff failed to make any effort whatsoever on his own behalf to obtain either Wyse's presence or his statement; and his request that the Air Force make such effort was by no means timely.

We find that plaintiff was fully notified of all charges and statements against him, including the sources thereof and that plaintiff failed to discharge the initial burden of attempting to produce those witnesses which he felt were necessary for the presentation of his case.

ILLEGAL SEIZURE OF PHOTOGRAPHS

Plaintiff contends that it was improper for the Board to admit certain allegedly obscene photographs into evidence because they had been illegally seized and that the legal advisor of the Board, himself, in effect, conceded that the photographs had been illegally obtained (page 20 of the Board Proceedings); that they were admitted solely on his opinion that "the rules applicable before a court-martial are not necessarily the same rules that are applicable before this Board. Essentially, the Board should be concerned with the *reliability* of the evidence which is presented to it." (emphasis added).

Plaintiff's brief, however, is not explicit, nor even clear, in explaining in what respect the acquisition of the photographs was an unreasonable search.

Defendant contends that, according to the record, the search was ordered in October, 1962, after plaintiff's commanding officer had been advised of plaintiff's association with one Schumacher, a German national, who allegedly had confessed to being in the employ of the East German Government; that the search was authorized to ascertain if there had been any security violations committed by plaintiff; that this search revealed the photographs; that the search, ordered and conducted in good faith and incidentally revealing the photographs, was reasonable and admission of the photographs was proper.

[6] The protections of the Fourth Amendment are, if not expressly, at least impliedly applicable to administrative discharge proceedings.

"It would seem wholly at odds with our traditions to allow the admission of evidence illegally seized by Government agents in discharge proceedings; which the court has analogized to proceedings that 'invoke the imposition of criminal sanctions * * *.'" Greene v. McElroy, *supra,* 360 U.S. at 496-497, 79 S.Ct. at 1413; Powell v. Zuckert, *supra,* 366 F.2d at 640.

[7] However, applying the Fourth Amendment standard, we find that the search and seizure in question was reasonable and that the photographs were admissible before the Board of Inquiry.

The photographs were seized during a search of plaintiff's bachelor officer's quarters, the search was ordered by plaintiff's commanding officer after he had been advised of plaintiff's association with a person accused of being an East German agent.

The photographs consisted of individual snapshots, apparently taken in plaintiff's quarters, of several women (one woman per photograph) in various stages of undress and in various suggestive poses.

We agree with the argument put forth by the defendant that the search, having been authorized to ascertain if there had been any security violations committed by plaintiff, was reasonable; and that the photographs, regardless of any ultimate finding of obscenity, were certainly evidence of improper conduct on plaintiff's part and were, therefore, properly seized incidental to a lawful search.

[8] Moreover, it is true that whether or not photographs were obscene they constituted evidence of misconduct on plaintiff's part; and, since the ultimate

charge against plaintiff was one of recurrent misconduct, the photographs were properly before the Board of Inquiry.

Therefore, we find it unnecessary to reach the question whether the Board's finding of "obscenity" was correct since plaintiff was discharged for recurrent misconduct and not for possession of obscene photographs.

CONCLUSION

Plaintiff raises several further arguments relating to double jeopardy, failure by the Air Force to follow its own regulations and insufficiency of the evidence in support of the findings by the Board of Inquiry.

We have considered each of these arguments in some detail and find that they fail to present any substantial questions concerning the validity of plaintiff's discharge.

The Air Force hearing by which plaintiff was discharged was, in our opinion, fair in that the procedural requirements were substantially complied with and the action by the Air Force authorities was neither arbitrary nor capricious.

We are of the opinion that there is no issue of material fact present in this case and that defendant is entitled to judgment as a matter of law pursuant to Rule 56 of the F.R.Civ.P.

Accordingly, it is the order of this court that defendant's motion for summary judgment should be, and the same is, hereby granted.

SUPREME COURT, U. S.
FILED
DEC 13 1973
MICHAEL RODAK, JR., CLERK

No. 73-637

In the Supreme Court of the United States

OCTOBER TERM, 1973

JERE L. DENTON, PETITIONER

v.

ROBERT C. SEAMANS,
SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The issue is whether the court of appeals correctly concluded that the petitioner's discharge from the Air Force as a result of administrative proceedings was valid, even though a witness petitioner wished to cross-examine did not appear at those proceedings.

1. Petitioner brought this suit in the district court to challenge the validity of his general discharge under honorable conditions from the Air Force. He alleged that the administrative proceedings which resulted in his discharge were unconstitutional and contrary to Air Force regulations, and that his discharge was without basis in the evidence. The district court granted summary judgment to the defendant. It rejected petitioner's claim that he was unfairly denied the opportunity to confront and cross-examine Col. Wyse, his former commanding

officer who had filed the charges against him, since petitioner had made no timely demand that the Air Force produce the witness, and had made no independent attempt to obtain his presence or his statement (Pet. App. xxxii-xxxiii).

The court of appeals unanimously affirmed, concluding that petitioner's inability to cross-examine Col. Wyse had no effect on the principal charge against him of associating, while a captain and senior pilot stationed in Germany, with an agent of the East German Intelligence Agency. The court noted that petitioner had not disputed the material facts underlying the charge and that his own statement established those facts (Pet. App. vii-ix). The court also found that there was no serious dispute concerning the charge of open and notorious cohabitation with a woman not his wife, and adequate evidence to support the Board's finding of failure to provide support for his dependents (Pet. App. xii, xiv). The court assumed, *arguendo,* that two of the charges, disrespect toward Col. Wyse and possession of obscene photographs, could not be sustained (Pet. App. xii-xiv).[1] The court affirmed the discharge, however, since it concluded that there was "no doubt" that the same administrative decision would have been reached on the basis of the three clearly proven charges, particularly the "very serious" charge of association with a foreign intelligence agent, and that, in fact, the two other

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[1] It expressed skepticism about the value to petitioner of Col. Wyse's participation, noting that he would have been a hostile witness, but concluded that if the charge of disrespect stood alone "we might well reverse because Denton had no chance to cross-examine Wyse. See *Greene* v. *McElroy,* 1959, 360 U.S. 474, 508" (Pet. App. xiv).

charges were simply "makeweight[s]" (Pet. App. xiv-xv).[2]

2. Petitioner claims that the court below failed to follow *Greene* v. *McElroy*, 360 U.S. 474, because it affirmed a dismissal based on the statements of a witness who was not available at the hearing. He contends that the failure to produce Col. Wyse denied him a fair hearing, and that, therefore, his discharge was improper.

The court of appeals recognized the significance of *Greene* and similar cases; indeed, it relied upon *Greene* in refusing to approve the charge of disrespect (Pet. App. xiv). It correctly found, however, that the principal charge against petitioner, association with a foreign intelligence agent, did not rest on Col. Wyse's statements. While the initial charge was filed by Col. Wyse, the court concluded that petitioner had not in fact disputed the material facts underlying the charge, and that petitioner's own statements substantiated the facts (Pet. App. vii-ix).[3] The court's conclusion is fully supported by the administrative record.[4]

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[2] The court of appeals, of course, could properly affirm on any ground supported by the district court record. *Jaffke* v. *Dunham*, 352 U.S. 280.

[3] These statements included petitioner's reply to the initial recommendation that administrative proceedings be initiated (appendix to appellant's brief in court of appeals, pp. 20-23), and his statement of October 29, 1962 to an OSI investigator (administrative record, Q, at 3-4, 13). The administrative record, which was part of the record in the district court, and petitioner's court of appeals brief, are being lodged with the Clerk of this Court.

[4] Petitioner does not claim that cross-examination of Col. Wyse would have been useful in rebutting the charge of unlawful cohabitation. It is not at all clear how such cross-examination could have helped petitioner in his defense against the charge of failure to provide for his dependents; in any event, since the

The court of appeals' upholding of the discharge notwithstanding its questions concerning two "make-weight" charges (disrespect toward Col. Wyse and possession of obscene photographs) is in accordance with the settled principle of administrative law that reversal is appropriate only if the reviewing court has substantial doubt that the same result would have been reached if the questioned findings had not been made. *Fairmont Foods Co.* v. *Hardin,* 442 F. 2d 762, 770-771 (C.A. D.C.); *Tashof* v. *Federal Trade Commission,* 437 F. 2d 707, 713 (C.A. D.C.); *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 379 F. 2d 453 (C.A. D.C.). The court properly concluded that there was "no doubt" that in this case the Board would have reached the same result in light of the "very serious" charge of association with a foreign intelligence agent and the charges of unlawful cohabitation and failure to provide for dependents.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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court first considered the effect of the absence of Col. Wyse's testimony, and then concluded that the evidence supported the failure—to—provide charge, the court apparently concluded Col. Wyse's testimony would not have helped petitioner in this aspect of the case.